

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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ACLU of Tennessee, Inc.,

Plaintiff,

vs.

NO. 2:17-cv-02120

City of Memphis, Tennessee,

Defendant.

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TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JON P. McCALLA, JUDGE

MONDAY

22ND OF JUNE, 2020

LISA J. MAYO, CRR, RMR  
OFFICIAL REPORTER  
FOURTH FLOOR FEDERAL BUILDING  
MEMPHIS, TENNESSEE 38103

A P P E A R A N C E S

Appearing on behalf of the Plaintiff:

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Appearing on behalf of the Defendant:

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Also Present:

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1                                   **MONDAY**

2                                   **June 22, 2020**

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6                   **THE COURT:** Good morning, Mr. McMullen.

7                   **MR. McMULLEN:** Good morning, Your Honor.

8                   **THE COURT:** We're getting close. I understand we  
9 need to get Mr. Castelli on. So I think that's slowing us  
10 down just a tad.

11                   **MR. McMULLEN:** He was on earlier and had some  
12 problems with his microphone, so he's logged out and is going  
13 to log back in and see if that clears it up.

14                   **THE COURT:** That sounds good. We've got our  
15 witness. How are you doing today? I'm making sure everybody  
16 can hear me okay.

17                   **MR. DAIGLE:** Good morning, Your Honor.

18                   **THE COURT:** Good morning. Good morning,  
19 Mr. Stanton, how are you today?

20                   **MR. STANTON:** Doing very well. Good morning,  
21 Your Honor.

22                   **THE COURT:** I'm going to leave mine on. If I  
23 close the mic, there's a problem. So I'll just leave it on.

24                   **MR. CASTELLI:** Sorry about that. I hope that  
25 worked.

**UNREDACTED TRANSCRIPT**

1                   **MR. McMULLEN:** I can hear you. Can you hear me,  
2 Tom?

3                   **MR. CASTELLI:** There we go.

4                   **THE COURT:** I think we have Mr. Castelli now.  
5 How are you this morning?

6                   **MR. CASTELLI:** I'm doing well. Thank you. A  
7 little technical difficulty there, Judge. Sorry about that.

8                   **THE COURT:** That's fine. I think we're ready to  
9 resume. We're going to let Mr. Sample open court and we'll  
10 proceed with the examination of the witness. So, Mr. Sample,  
11 we're going to open court.

12                   All right. We were in the examination of our  
13 witness, and so we're ready to proceed. The witness is back  
14 on the stand.

15                   **MR. McMULLEN:** Your Honor?

16                   **THE COURT:** Yes, sir.

17                   **MR. McMULLEN:** Your Honor, I have a preliminary  
18 matter before we get to the witness I would like to address  
19 with the Court and all the parties.

20                   **THE COURT:** Sure, sure.

21                   **MR. McMULLEN:** Related to filing our post-trial  
22 brief, I've been thoroughly taken to the woodshed by my team  
23 and --

24                   **THE COURT:** Okay.

25                   **MR. McMULLEN:** -- and --

1           **THE COURT:** Tell them to be careful.

2           **MR. McMULLEN:** -- yes -- we would like to kind of  
3 amend our proposal to say the five days after we receive a  
4 copy of the transcript. We're going to be --

5           **THE COURT:** Have you ordered -- have you ordered  
6 transcript? If you've not ordered transcript, then you could  
7 have ordered it last week. Did you order it last week?

8           **MR. McMULLEN:** No. No, we did not, Your Honor.

9           **THE COURT:** All right. The way it typically  
10 works -- and I'll think about it. We may do that. But if  
11 you fail to order the transcript, then that -- or any party,  
12 any party in any case then that's typically on them for  
13 failure to do so. And so you might want to remind staff that  
14 they would want to do that in the future because they could  
15 have ordered it on, you know, Thursday or Wednesday at the  
16 end of the day or Friday, and that's the normal practice when  
17 we have short deadlines, but we'll check right now.

18           So, Mr. Sample, let's check and see how quickly  
19 those transcripts can be turned around. They probably could  
20 have had them for you today --

21           **THE CLERK:** Probably.

22           **THE COURT:** -- if you would have let them know.  
23 So we'll check on that and then we'll take this up at the  
24 end. I'm sure we can adjust it a little bit, but let's see  
25 if we can't get that moving.

1           You want to order all the transcripts, is that  
2 what you're saying? I mean, I don't personally order them.  
3 So -- well, I mean, sometimes I do. They're not personal.  
4 But I'll tell them that you're ordering them and then we'll  
5 let the rest of you figure out the best way you need to  
6 handle that, but we'll work it out. We'll work it out so  
7 you've got enough time.

8           Okay. We'll do that.

9           **MR. McMULLEN:** Thank you, Your Honor.

10          **THE COURT:** No problem. We'll get that at the  
11 very end after you've got a little more information. Okay.

12          **MR. McMULLEN:** Your Honor?

13          **THE COURT:** Yes, sir.

14          **MR. McMULLEN:** Ms. Silk will be handling the  
15 witness. I will move out of the screen.

16          **THE COURT:** Okay. All right. We're glad to have  
17 you. Mr. Daigle, how are you today?

18          **THE WITNESS:** Very well, thank you, Your Honor.

19          **THE COURT:** All right. We've got you back on the  
20 stand. Ms. Silk, you may proceed with the witness.

21          **MS. SILK:** Good morning, Your Honor. Good  
22 morning, Mr. Daigle. Can you hear me okay?

23          **THE WITNESS:** I can. Can you hear me okay?

24          **MS. SILK:** I can, thank you.

25          Your Honor, in my haste to try to get through



1 Mr. Daigle's examination on Thursday, I neglected to enter  
2 his CV into evidence. While it's attached to his report, we  
3 would like to go ahead and mark it as an exhibit if that's  
4 okay.

5 **THE COURT:** Sure. We'll mark that as exhibit --  
6 should be Exhibit, I think, 28. Is that right, Mr. Sample?

7 **THE CLERK:** It is, yes, sir.

8 **THE COURT:** Exhibit 28, marked and received. It  
9 was Exhibit A so now it's Exhibit 28.

10 (WHEREUPON, the above-mentioned document was  
11 marked as Exhibit Number 28.)

12 **THE COURT:** Yes, ma'am. You may proceed.

13 **MS. SILK:** Thank you.

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TESTIMONY OF E. DAIGLE

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**ERIC DAIGLE,**

**was called as a witness and having first been duly sworn  
testified as follows:**

**DIRECT EXAMINATION**

**BY MS. SILK:**

Q. Mr. Daigle, I would like to talk to you for a few minutes about social media policies for law enforcement agencies generally. Are there any best practices for the creation or use of social media by law enforcement agencies?

A. There are.

Q. And you referenced a document in your report paragraph 36, page ID 9183 that's titled "Developing a policy on the use of social media in intelligence and investigative activity"?

A. I did, yes.

**THE COURT:** Mr. Daigle, they've asked that you get a little closer to your mic and speak up. Court reporter needs a little help.

**THE WITNESS:** Okay. Is that better?

**THE COURT:** Yes. She indicated it is much better. We'll let you know if it becomes a problem. Thanks so much.

**THE WITNESS:** Thank you, Your Honor.

UNREDACTED TRANSCRIPT

**TESTIMONY OF E. DAIGLE**

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1                   **THE COURT:** Thank you.

2           BY MS. SILK:

3           Q. We would like to publish on the screen for Mr. Daigle  
4 to see the report that he referenced, the document that he  
5 referenced in his report titled "Developing a policy on the  
6 use of social media." Do you see it there?

7           A. I do, yes, ma'am.

8           Q. Is this the report that you relied upon and reference  
9 in your expert report?

10          A. It is, yes.

11                   **MS. SILK:** We would like to enter this into  
12 evidence and mark it as the next exhibit.

13                   **THE COURT:** Not properly introduced under the  
14 rule. Can you see if you can do that? That was inadequate  
15 background there. So let's see if you can properly introduce  
16 it.

17                   **MS. SILK:** Okay.

18           BY MS. SILK:

19          Q. Well, in your report, Mr. Daigle, you reference this  
20 report in Section F. Could you tell us a little bit about  
21 why and how you -- why you reference and included this  
22 document in your report?

23          A. Okay. There has been -- you asked the question about  
24 best practices in policy developing for social media. There  
25 has been a multi-year -- I would say we're going on about

**TESTIMONY OF E. DAIGLE**

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1 eight years of attempt by law enforcement associations to  
2 develop a model social media policy, and to this point most  
3 of the social media policies that are developed are directly  
4 related to the use of social media by employees and the First  
5 Amendment protection of an employee, a government employee,  
6 and when and how a government employee can use social media.

7       The manner in which we're addressing the issues in  
8 front of the Court, the decree, that has had little national  
9 application. Some agencies have attempted to formulate  
10 policies on the search of social media, and I found this  
11 document to be one of the most contemporaneous documents.  
12 Since it was put out by Department of Justice and the Bureau  
13 of Justice Affairs under a grant by the federal government, I  
14 thought that was the best research mechanism that I had found  
15 to this point to put some guidance on the issues of best  
16 practices since this document talks about evaluating  
17 different agencies, policies and their use of social media in  
18 investigative capacity.

19       Q. Do you consider this to be an authoritative document  
20 on the use of developing a policy on the use of social media?

21       A. I do. It was published by the Bureau of Justice  
22 Administration in conjunction with the Department of Justice,  
23 and you know, there are many documents out there that we rely  
24 upon that are published by these agencies since they're  
25 funded in -- they are funded for the purposes of providing

**TESTIMONY OF E. DAIGLE**

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1 guidance on subjects that they publish about.

2 Q. Great. I want to --

3 **THE COURT:** There are a couple of things you have  
4 to go through to even have a chance to introduce it other  
5 than to reference it. Learned treatises are typically not  
6 admitted unless there's certain admissions by counsel  
7 opposite perhaps. Also the age of the document, how long  
8 it's been recognized as a document, the publisher of the  
9 document, the type of scrutiny that document has received.  
10 Typically they're not received as evidence. They could be.  
11 They could be.

12 We might want to get a few -- a little more  
13 information there, but we can mark it -- what we'll do is  
14 mark it as 29 for ID only, and at some point in time if it's  
15 capable of being admitted for its substance then we can  
16 consider that.

17 I'd like everybody to please look at that because  
18 of course there are many documents out now that deal with the  
19 use of social media, and so far the testimony wouldn't make  
20 it admissible, but it would make it something that we would  
21 mark for ID only. We need to get a number on it, because  
22 apparently we're going to talk about it some. So ID only,  
23 marked and received.

24 Anything else from anybody else -- Mr. Castelli,  
25 anything on this at this point in time?

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14

1           **MR. CASTELLI:** No, Your Honor. I think I agree  
2 with the Court's assessment at this point on its  
3 admissibility.

4           **THE COURT:** Okay. Anybody else on that? We've  
5 got it then as ID only, but it's 29.

6           (WHEREUPON, the above-mentioned document was  
7 marked as Exhibit Number 29ID.)

8           **THE COURT:** Okay. Counsel may proceed.

9           **MS. SILK:** Thank you, Your Honor.

10 BY MS. SILK:

11 Q. Mr. Daigle, when was this document created?

12 A. The publishing date on the document is February 2013.

13 Q. And you testified that it was created pursuant to a  
14 grant. Is that -- am I remembering correctly?

15           **THE COURT:** You're welcome to attempt to, but it  
16 doesn't appear that it's admissible. It appears it's only an  
17 ID document.

18           Do you understand the rule that we're going under  
19 on this? If you want to make reference to it, that would  
20 probably help in the analysis if you want to pursue it.

21           **MS. SILK:** Sure, Your Honor. That's no problem.  
22 I totally understand.

23           **THE COURT:** Okay. No problem.

24 BY MS. SILK:

25 Q. Mr. Daigle, regarding the use of social media and

**TESTIMONY OF E. DAIGLE**

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1 social media policy, in your report, you describe three  
2 levels of use of social media, and I would like for you to if  
3 you can please explain those levels to us.

4 The first one is apparent/overt use. What is  
5 apparent/overt use of social media in a criminal or  
6 intelligence-gathering capacity?

7 A. That would be where the law enforcement officer's  
8 identification does not need to be concealed in any way.  
9 It's kind of correlating to a Fourth Amendment consensual  
10 contact information application meaning it's just everyday  
11 use and there's no need to conceal the fact that it was  
12 looked at and/or the fact of who looked at it.

13 Q. Is this type of apparent/overt use on what we call  
14 open source?

15 A. It could be. It could be, yes. And it could also be  
16 an officer's use of their own private or, you know, a social  
17 media where they come upon something just in their daily open  
18 source review.

19 Q. And that level of social media use by law enforcement  
20 you described as discreet use; is that correct?

21 A. Yes.

22 Q. Could you please describe for the Court what the  
23 discreet use engagement level entails?

24 A. That would be the next step up. That would be where  
25 there might be a need to limit the interaction. There is

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1 no -- in discreet use, there's no interaction between the law  
2 enforcement officer and any member of the public maintaining  
3 the social media account. It might be just a watching  
4 application, but at some point where the -- there might be  
5 some need to not show the law enforcement member's  
6 identification and who is actually watching.

7 It's kind of like a middle ground where there is --  
8 they're not interacting in any way but they're just one step  
9 above just an open source review.

10 Q. And then the third level that you've described which  
11 I'm gathering is the most invasive level is what you call  
12 covert use; is that correct?

13 A. Yes, covert use.

14 Q. And can you explain what covert use engagement level  
15 is?

16 A. So the covert use would be where a social media  
17 account is being used for a covert perspective and the fact  
18 that it's using another name or identity. There may be  
19 interaction between the covert account and other members of  
20 society, and this is the part where when we talk about policy  
21 development, this is the part where the most -- most  
22 intensive guidelines or supervision controls need to be put  
23 in place for the covert application.

24 Q. So how would -- in your experience, how could a social  
25 media policy for a law enforcement agency handle these



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1 different types of social media use engagement specifically  
2 regarding authorization required for each type of engagement?

3 A. So, interestingly, there is not a lot of guidance on  
4 that in the country. You are one of the first entities that  
5 are addressing this in a national which I think will be  
6 better understood by different agencies since most law  
7 enforcement agencies do not have the guidance of the decree  
8 that you guys are under. Most of this all the way up to  
9 covert is just general every day application.

10 We do encourage departments no different than they  
11 would years ago with a covert operation or using a  
12 confidential informant that there should be some policy  
13 guidelines in place to ensure that there are some controls as  
14 to who, what, when and where is occurring in a covert  
15 operation. The department should have knowledge of what  
16 covert acts their department members are doing so that there  
17 can be some oversight in ensuring the effectiveness of that  
18 operation.

19 Q. Great. So you agree -- would you agree that it's --  
20 it is appropriate for a social media policy to have differing  
21 levels of engagement for differing levels of social media  
22 use?

23 A. I think that's the trend that we're starting to see,  
24 and why I think it's appropriate is because it's -- again,  
25 it's an understanding and we're trying to have officers doing

**TESTIMONY OF E. DAIGLE**

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1 investigations understand when and where they need to have  
2 different levels of authority.

3 So, especially in the world of training, we try to  
4 correlate it to what they're already familiar with in the  
5 Fourth Amendment, and that would be the difference between  
6 the three levels of consensual contact, reasonable suspicion  
7 and probable cause. Since they're already very familiar with  
8 that aspect of the Fourth Amendment, we've tried to give them  
9 the same form of guidance in the social media investigative  
10 application.

11 And I'd like to be clear, when you say use of social  
12 media, what is very apparent in the industry is that  
13 everybody directly relates that to an officer using social  
14 media for their own purposes, not from what you're talking  
15 about here today which is in addition to that, the  
16 investigative arm of using social media.

17 Q. Great. Thank you.

18 Now I'd like to talk for a second about one of the  
19 proposed modifications that the parties have proposed in  
20 their Proposed Modified Consent Decree which is Trial  
21 Exhibit 21, and I would like to share the screen so everyone  
22 can see it. This is Section F(1). Can you see it there?

23 A. I do, yes.

24 Q. Okay. So in Section F(1), the original language of  
25 the Decree -- you can read it there and I won't read it for

**TESTIMONY OF E. DAIGLE**

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1 you -- but the parties have modified this provision to  
2 specifically allow for -- excuse me. Scroll down just a  
3 little bit. F(3). The parties have added a paragraph that  
4 expressly allows for the Memphis Police Department to have  
5 officers present at gatherings of persons engaged in First  
6 Amendment activity for the purpose of ensuring public safety  
7 as long as the Memphis Police Department's presence is not  
8 for the purpose of or may reasonably have the effect of  
9 harassment or intimidation.

10 Mr. Daigle, how has First Amendment related gatherings  
11 changed since 1978?

12 A. Well, the gathering is -- probably hasn't changed but  
13 the mechanism -- because it's still a gathering of people,  
14 but the mechanisms to gather those people in the -- in the  
15 way law enforcement responds to the gathering of people has  
16 dramatically changed since 1978.

17 Q. And how has the nature of responding to and preparing  
18 for those activities changed since 1978 by law enforcement?

19 A. Well, by law enforcement, we now have more clearly  
20 established law guiding what law enforcement can and can't  
21 do, and it gives us better principles to teach our officers  
22 on, you know, the content-neutral time, place and manner  
23 restrictions since there's been court cases across the  
24 country that have interpreted that for us. It gives us  
25 better ability. And over the years there has been a

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1 significant change in the mechanisms in the way law  
2 enforcement responds to crowd control, crowd management  
3 aspects, protests, unlawful -- declaring unlawful assemblies.  
4 Some of the ways that these things occurred over the years  
5 were not effective, and history -- based on history and court  
6 cases, they have attempted to modify a lot of the practices  
7 in order to ensure that there is an effectiveness of  
8 maintaining public safety while ensuring individuals have the  
9 freedom to protest under the First Amendment rights.

10 Q. And in today -- in modern society, can crowd size  
11 typically quickly increase because of technological advances  
12 like social media more so than they could in 1978?

13 A. Absolutely. We've seen that across the country.

14 Q. Is it your opinion that law enforcement officers  
15 should be present at First Amendment gatherings to ensure  
16 public safety?

17 A. Yes.

18 **THE COURT:** I'm sorry. Do you mean all First  
19 Amendment gatherings? They should be at the church to make  
20 sure public safety occurs there? That's a First Amendment  
21 gathering.

22 **THE WITNESS:** I think there should be a need to  
23 have law enforcement there not for the purpose of law  
24 enforcement itself but the purpose of today's day and age  
25 where we're in a new era where --

**TESTIMONY OF E. DAIGLE**

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1           **THE COURT:** You made a broad statement that they  
2 should be present at First Amendment gatherings. You don't  
3 mean that? You mean only certain events? Is that right or  
4 wrong or all First Amendment gatherings?

5           **THE WITNESS:** The example you gave, Your Honor,  
6 in the church I guess that would be a no.

7           **THE COURT:** What about at, you know, you want to  
8 express yourself on abortion rights on Union Avenue or Poplar  
9 Avenue in Memphis and there are five people have expressing  
10 themselves at First Amendment gathering, picket signs? They  
11 can be on either side of the issue. They should be present  
12 there?

13           **THE WITNESS:** If there -- it is possible, Your  
14 Honor, just for the protection of those individuals.

15           **THE COURT:** So if there are five people on Poplar  
16 Avenue near the intersection of Poplar and Parkway, they  
17 should -- they should have police presence even though all  
18 they're doing is carrying a picket sign?

19           **THE WITNESS:** I guess the difficulty, Your Honor,  
20 is what is a police presence. Should an officer stop by and  
21 make sure everybody is okay? Yes, I think they should.  
22 Should they --

23           **THE COURT:** Why should an officer do that? He's  
24 not needed. There's nothing going on. They're just walking  
25 around or maybe just standing there with a sign. Do you

**TESTIMONY OF E. DAIGLE**

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1 think they should still go by and say something to people who  
2 are expressing themselves in a First Amendment way, just  
3 because they're expressing themselves in a First Amendment  
4 way?

5 **THE WITNESS:** Your Honor, what I'm saying is that  
6 they should stop by community interaction and make sure  
7 everything is okay. We encourage --

8 **THE COURT:** So that means that if you have a  
9 Black Lives Matter event and you have three people with a  
10 sign that says Black Lives Matter, an officer should come by  
11 and, quote, see if they're okay.

12 **THE WITNESS:** You keep reducing the size, Your  
13 Honor, so as the size reduction goes down, the safety goes  
14 down.

15 **THE COURT:** Does the First Amendment change when  
16 the size goes down?

17 **THE WITNESS:** No, Your Honor, but the threat  
18 might change.

19 **THE COURT:** Okay. So if there are ten people he  
20 should stop by, but if there are three he shouldn't stop by?

21 **THE WITNESS:** I would actually like the officers  
22 to always stop by and check in with the individuals to make  
23 sure everything is okay.

24 **THE COURT:** And particularly if it's a Black  
25 Lives Matter protest, is that right?

**TESTIMONY OF E. DAIGLE**

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1                   **THE WITNESS:** No. I'm saying all protests, Your  
2 Honor.

3                   **THE COURT:** So if it's an abortion proponent they  
4 should definitely stop by?

5                   **THE WITNESS:** There's no -- it's consistent  
6 across the board. They should always stop by, Your Honor, in  
7 my opinion in community policing to make sure there's open  
8 communications in case there is a safety issue that comes  
9 forward.

10                  **THE COURT:** That's your interpretation of how the  
11 First Amendment works, is that right?

12                  **THE WITNESS:** I don't know that that's a First  
13 Amendment issue, Your Honor, because they're not addressing  
14 the time, place and manner restrictions. It's a community  
15 policing issue of ensuring that there is open communication  
16 in case an issue presents itself in the future.

17                  **THE COURT:** So they should just always stop by no  
18 matter what or how peaceful you are, how limited number of  
19 people there are because you're out there with a sign?

20                  **THE WITNESS:** It's not the sign that initiates  
21 it, Your Honor. It's the group and gathering the attention.  
22 I think the community policing officer should stop everything  
23 that occurs in their area.

24                  **THE COURT:** Okay. I think we understand your  
25 position. I think you can go right ahead. Thank you.

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1                   **THE WITNESS:** Okay.

2                   **MS. SILK:** Thank you.

3 BY MS. SILK:

4       Q.     Mr. Daigle, I would like to now move to Section H of  
5 the Proposed Modified Consent Decree. Specifically, I want  
6 to direct your attention to the second paragraph which  
7 paraphrases restricts the defendants City of Memphis from  
8 disseminating personal information about any person collected  
9 in the course of a lawful investigation of criminal conduct  
10 except that such information may be disseminated to another  
11 government law enforcement agency engaged in a lawful  
12 investigation of criminal conduct.

13           In your experience with other law enforcement  
14 agencies, is it common or best practice that a law  
15 enforcement agency might share personal information about a  
16 person collected in the course of a criminal investigation  
17 with a private entity like a security force of a private  
18 company?

19       A.     It is very possible and does happen, yes.

20       Q.     So you work with Oakland Police Department; is that  
21 correct?

22       A.     Yes, yes.

23       Q.     And so, for example, if Oakland Police Department  
24 received a tip that someone -- a particular person was  
25 planning a large demonstration against the local children's



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1 hospital for whatever reason, would Oakland PD likely share  
2 that tip with the security of the local children's hospital?

3 A. In my experience, yes.

4 Q. But here in Memphis, Section H would prohibit MPD from  
5 sharing that information. Is that your interpretation of  
6 Section H?

7 A. It would prohibit anything that is personal in nature.  
8 So the difficulty is what is the information. You obviously  
9 couldn't identify the people you got that information from a  
10 law enforcement entity. So that would be a challenge to  
11 notifying any type of corporate security.

12 Q. Okay. Thank you.

13 Now I'd like to pull up on the screen Trial  
14 Exhibit 19, which is I believe the original Consent Decree.  
15 We're going to talk about Section I on the restriction on  
16 joint operations.

17 A. Okay.

18 Q. Give us one second and we'll pull it up. Are you  
19 familiar with Section I?

20 A. Yes, I've reviewed it.

21 Q. Okay. When you first read this, as somebody that has  
22 no experience with the Decree, a newbie so to speak, how did  
23 you interpret this?

24 A. I found it to be very restrictive to any interaction  
25 or joint operations with anybody, any other law enforcement

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1 working with the City of Memphis.

2 Q. How has collaboration between law enforcement agencies  
3 like local, state and federal changed since 1978?

4 A. Significant changes and improvements in the  
5 collaboration of sharing information. A lot of the witnesses  
6 had testified about the things that have occurred, but we've  
7 seen now more than ever, which was a detriment to law  
8 enforcement over the years, collaboration and sharing  
9 information in the early '70s through the '80s was a  
10 challenge, and now it is something that is an everyday  
11 application such as, you know -- such as the continuous  
12 information that a fusion center or other federal entities  
13 can share with the location -- the law enforcement the  
14 location that information is obtained from.

15 Q. What happens when agencies do not effectively  
16 collaborate? Do you have any examples?

17 A. I use two examples in my report. Obviously 9-11 is a  
18 great example of a lack of information sharing and actually  
19 became the foundational -- foundation for change in that  
20 collaboration. And I always find one very interesting to use  
21 as an example and that would be the serial killer  
22 investigation of Ted Bundy. It was a great example of how  
23 collaboration or lack of collaboration between entities  
24 allows people to continue heinous crimes without being  
25 caught.

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1 Q. Regarding 9-11 that you mentioned, would you describe  
2 that as a significant change in circumstances related to  
3 inner-agency sharing of information?

4 A. Since 9-11, yes.

5 Q. Okay. I would like to show the witness Trial  
6 Exhibit 25, which is the part -- which is the City's proposed  
7 modification to Section I, and I just want to ask Mr. Daigle  
8 if he has had an opportunity to review this.

9 A. I have, yes.

10 Q. In your opinion, what does this modification allow the  
11 City to do expressly?

12 A. Well, I think it allows the City to continue in a  
13 practice of maintaining the safety of the citizens in the  
14 City while ensuring that the amendments -- while ensuring  
15 that the Decree standards are still in play.

16 One of my simple responses to this is when I first  
17 read it I kind of was asking, well, what is the intent of the  
18 Decree here; and the intent of the Decree as I could  
19 interpret it was not to allow the City of Memphis to use  
20 other third party agencies to do the things that the Decree  
21 prohibited. And one of my responses to that was, well, why  
22 doesn't it just say that. Just -- the Decree is very  
23 specific on what it allows -- what has been allowed, and I  
24 think it's direct enough to be able to ensure that you're  
25 just telling the City of Memphis and its employees that we're

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1 not going to tolerate you using anybody else as a subrogate  
2 to get that information. That still applies in your  
3 interaction.

4 And what it will do here is it will allow the City of  
5 Memphis and the Memphis Police Department to interact with  
6 other law enforcement entities and still understand that they  
7 have the -- they have to maintain the requirements of the  
8 agreement as it's -- as it will be interpreted.

9 Q. Great. Now I want to go back to something you said  
10 just a minute ago regarding the Ted Bundy investigation. Can  
11 you elaborate on that a little bit in regards to how the --  
12 the way that the agencies were not able to share information  
13 effectively and kind of give us a little bit of explanation?

14 A. Sure. Having spent my career in homicide, I always  
15 watch these type of investigations, and I spent a lot of time  
16 evaluating the Ted Bundy investigation with Sheriff Ken  
17 Katsaris who was the sheriff that first placed him in custody  
18 and had him in his jail for many years. And one of the  
19 things that was very prominent that we use as a teaching tool  
20 for law enforcement is that Mr. Bundy continually said I knew  
21 how the system worked and I knew how to work around it. And  
22 what he would do is he would kidnap in one jurisdiction. He  
23 would murder in another jurisdiction and he would deposit the  
24 remains in a third jurisdiction because he knew based on his  
25 experience that law enforcement was not good at collaborating

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1 and was not good at discussing and they would hold their  
2 crime scenes close to themselves and not share information,  
3 which meant that it would be longer for them to track him  
4 down than if they worked together on that information. So he  
5 was using the system to his benefit, and that was a system  
6 that we've learned over the years did not work effectively,  
7 and law enforcement has done -- put a tremendous amount of  
8 effort into ensuring open collaboration for the purposes of  
9 sharing information so that they could prevent things that,  
10 you know, are significant from happening again.

11 Q. Great. Thank you.

12 Now, back to -- back to the City's proposed  
13 modification that you're looking at on the screen here for  
14 Section I. So you mentioned that when you first -- when you  
15 were evaluating Section I that you wondered why Section I  
16 just didn't say what the parties' intent for it to mean,  
17 which you interpreted it to be that the City may not direct  
18 another agency to act as a surrogate to violate the Consent  
19 Decree.

20 Now is the proposed modification you're looking at  
21 now -- does it reflect that?

22 A. The language that you have in blue there, it does  
23 reflect that exact intent which is, you know, the City may  
24 not direct an agency -- other agency to violate any portion  
25 of the Decree as a get-around to the Decree.

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1 Q. And the second paragraph, the second proposed  
2 paragraph to Section I, this language -- I'm sure you're  
3 familiar -- came from the Court's own order interpreting  
4 Section I. Would modification of Section I to include the  
5 proper interpretation of Section I be important for law  
6 enforcement so that they have one document?

7 A. I agree that it would be. And again, the underlying  
8 implication here is to ensure that the officers working on  
9 patrol understand what they can and cannot do in the Decree.  
10 Like I said in my testimony the first day, the more specific  
11 that we can get in policy and in legal standards the more  
12 another officer is able and capable to interpret and ensure  
13 that they're meeting those requirements.

14 So anything that clarifies, like the second paragraph  
15 does here, anything that clarifies what is allowed and what  
16 is not allowed makes it easier for the officers to deal with  
17 when they're faced with the situation.

18 Q. Okay. Thank you.

19 Mr. Daigle, you've heard me use the phrase the entire  
20 Proposed Modified Consent Decree, is that correct?

21 A. I have, yes.

22 Q. And is it your opinion that the modification that the  
23 parties propose comport with best police practices for the  
24 most part?

25 A. As I said on day one, I think the parties have done a

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1 good job of finding a happy medium and the language that's  
2 there to ensure the Decree still has the guidance necessary,  
3 and I think it's to a point where officers can understand  
4 what certain words mean and how they should interpret that  
5 implication.

6 **MS. SILK:** Thank you. No further questions.

7 **THE COURT:** Cross-examination?

8 Mr. Castelli?

9 **MR. CASTELLI:** Yes. Thank you, Your Honor.

10 **CROSS-EXAMINATION**

11 **BY MR. CASTELLI:**

12 Q. Good morning, Mr. Daigle. I'm Tom Castelli with ACLU  
13 of Tennessee. Just a couple of follow-up questions first  
14 from your testimony from Thursday.

15 I believe you had testified about the need to conduct  
16 threat assessments by the police department. Do you recall  
17 that testimony?

18 A. Yes. Good morning, sir. And yes, I do recall.

19 Q. All right. Thanks.

20 And I just want to -- would you agree with me that a  
21 lot of the threats that law enforcement need to assess are  
22 threats of some kind of criminal conduct; is that right?

23 A. I don't know that I can agree with that, sir, because  
24 a threat -- there are hundreds of threats that -- you've  
25 heard the witnesses testify as an example that are perceived

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1 as a threat that later turned out to be nonthreatening. So I  
2 don't know that there's a direct correlation between the two.

3 Q. Well, sure. I mean, it may be that the investigation  
4 doesn't turn up actual criminal conduct, but what I'm asking  
5 are -- is whether the threats are threats of someone causing  
6 someone else injury, for example. That would be one of the  
7 threats you're trying to assess, correct?

8 A. Yes, sir. So that the -- sorry.

9 Q. And so that would be trying to assess whether or not  
10 someone's going to commit a violent type crime that might  
11 cause physical injury, correct?

12 A. Yes, sir.

13 Q. All right. And then regarding social media, I think  
14 you've testified some today and some last week about the  
15 use -- law enforcement's use of social media. And to make  
16 sure I understand, your opinion is that there is useful  
17 information for conducting criminal investigations found on  
18 social media? Is that your opinion?

19 A. I don't understand sir. I'm sorry.

20 Q. Is it your experience and your opinion that there is  
21 useful information to law enforcement when they're conducting  
22 criminal investigations on social media?

23 A. Yes, sir.

24 Q. Okay. But you also would agree, though, that there's  
25 also -- social media has also become a platform for the



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1 expression of free speech?

2 A. Yes, sir.

3 Q. So you would agree that the government in general just  
4 has to be careful with what kind of data they're collecting  
5 off of social media?

6 A. Yes, sir.

7 Q. All right. And I believe you just testified, though,  
8 that some of these modifications that the parties have  
9 jointly proposed would take into account law enforcement's  
10 need to use social media; is that correct?

11 A. Yes, sir.

12 Q. But also leave in place the protections to make sure  
13 that they're not kind of abusing their access to it?

14 A. Yes, sir.

15 Q. Okay. And you testified today about Section I of the  
16 Decree. So would you agree just the original language -- and  
17 I can put it back up if you need me to. I believe it was  
18 Exhibit 19, and let me share that with the Court.

19 Okay. Could you read that, Mr. Daigle? I'm not sure  
20 exactly. Maybe make it a little bigger. Is that legible on  
21 your screen?

22 A. Yes, sir, it is.

23 Q. Okay. Great. So I believe your testimony was that  
24 when you read this, you thought it was very restrictive on  
25 joint operations between law enforcement agencies. Am I

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1 right that that was your testimony earlier?

2 A. Yes, sir.

3 Q. All right. You would agree with me that even this  
4 language doesn't restrict all exchanges of information  
5 between law enforcement agencies?

6 A. I would agree with that, yes, sir.

7 Q. And it doesn't prevent or prohibit all collaboration  
8 between the Memphis Police Department and other law  
9 enforcement agencies?

10 A. It does not prevent it, no.

11 Q. And it doesn't prevent collaboration from the Memphis  
12 Police Department and a private security agency -- all  
13 collaboration between the Memphis Police Department and a  
14 private security agency?

15 A. I guess what the challenge is that word collaboration,  
16 sir, that's the problem with I is the definitions are what's  
17 important. So they could talk to private security, yes, but  
18 to what level and what information can be shared is what is  
19 unclear.

20 Q. Well, I mean, certainly you would agree that what it  
21 is prohibiting is any type of collaboration that would  
22 violate the Decree, correct?

23 A. In sum, in theory, yes, I agree with that. That is  
24 what the issue is, though.

25 Q. So if the collaboration is purely about a criminal

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1 investigation and doesn't touch on any of these First  
2 Amendment issues, then Section I wouldn't have any ^ effect  
3 on that collaboration?

4 A. You are correct, sir.

5 Q. And you talked some about the Ted Bundy case and some  
6 of the problems that law enforcement ran into with their  
7 level of collaboration. That was a murder and kidnapping  
8 investigation, am I right, or were there other crimes that  
9 were being investigated there?

10 A. Ted Bundy had -- it's just not murder, but it was  
11 significant, you know, rape and kidnapping and murder from,  
12 you know, Oregon all the way through to Florida over a period  
13 of time.

14 Q. Multiple jurisdictions, multiple different types of  
15 crimes that were committed in various jurisdictions across  
16 the country?

17 A. Yes, sir.

18 Q. Were there any free speech type concerns in that  
19 particular case?

20 A. Not that I'm aware of, sir, no.

21 Q. Are you -- have you had a chance to review the Court's  
22 order which is -- the Court's order that was issued in  
23 November of 2019 that we've talked about throughout the  
24 hearing, ECF number 250?

25 A. I did review it during the time of preparing the

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1 report and preparing for this. It's been a little bit. You  
2 might want to show it to me.

3 Q. Well, I think -- really my question is generally after  
4 you reviewed that order did that give you a better  
5 understanding of how Section I functions under the Decree?

6 A. It gave me a better understanding of how Your Honor  
7 had interpreted Section I, and that it did, yes.

8 Q. And you would agree with me that once the Court weighs  
9 in on a Consent Decree and interprets it, that's how it  
10 functions going forward, right?

11 A. Yes and no. That is the Court's interpretation. The  
12 difficulty is that those are not the words on the page of the  
13 Decree. So that's the challenge. So while the Judge's  
14 interpretation has to be shared with the members of the  
15 police department, it's another level of understanding for  
16 the officers.

17 Q. And some of that would be what training on the Decree  
18 would need to entail is bringing in various court  
19 interpretations of the Decree and examples of how the Decree  
20 has functioned in the past; is that correct?

21 A. Yes. That's how we -- that's how we train in a  
22 scenario-type application.

23 **MR. CASTELLI:** Those are my questions, Your  
24 Honor. Thank you. Thank you, Mr. Daigle.

25 **THE WITNESS:** Thank you, sir.

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1                   **THE COURT:** Any questions from the Monitor?

2                   **MR. STANTON:** Good morning, Your Honor, yes, a  
3 few.

4                                   **CROSS-EXAMINATION**

5                   **BY MR. STANTON:**

6                   Q. Good morning, Mr. Daigle.

7                   A. Good morning, sir.

8                   Q. I want to start with kind of a preliminary inquiry.  
9 You're aware that the City has withdrawn the portion of its  
10 morning that is directed to vacator of the Consent Decree?  
11 You're aware of that, right?

12                  A. Yes, sir, I am.

13                  Q. And I believe Ms. Silk asked you that last week if the  
14 withdrawal of the request to vacate the Consent Decree moots  
15 any part of your report, and your response to that was no; is  
16 that right?

17                  A. That was my response, yes.

18                  Q. Okay. I'd like to look at Paragraph 40 of your  
19 report. If we can pull up that report. It's ECF 306, and I  
20 think it's Trial Exhibit 23. Let's scroll down to numbered  
21 Paragraph 40. I just -- now Mr. Daigle, I want to direct  
22 your attention to the last sentence of Paragraph 40 there.  
23 I'm going to read it. I want you to tell me if I read it  
24 correctly.

25                         It says, in 2020 there's no need for a decree to

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1 protect citizens' rights. The law and effective operation of  
2 the department does that already.

3 Now that's no longer the City's position; is that  
4 right?

5 A. That is no longer the City's position is my  
6 understanding, yes.

7 Q. So that would moot this portion of your report, right?

8 A. Well, that's still my opinion.

9 Q. Well, that's not the question. The question isn't  
10 what your opinion is. The question is does the City's  
11 withdrawal of this request to vacate the Consent Decree moot  
12 this portion of your report for purposes of this case?

13 A. I don't -- I'm not the City, but I would say that the  
14 statement is still accurate; that clearly established law is  
15 the guiding principle there. I know that they're not  
16 attempting to vacate it, but that is the challenge that we're  
17 faced with here in the Decree is the conflict between clearly  
18 established law, operational standards and the 1978 Decree.

19 Q. All interesting but not responsive to my question.

20 At issue is the City's -- the parties' joint effort to  
21 modify the Consent Decree, not to vacate it. So this portion  
22 of your report and any other portions directed to vacating  
23 the Consent Decree are moot, right?

24 **MS. SILK:** I object, Your Honor. It's asked and  
25 answered.

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1                   **THE COURT:** Objection is overruled.

2                   **THE WITNESS:** I don't believe they are because  
3 I'm not saying in that statement that it needs to be vacated.

4 BY MR. STANTON:

5       Q. Well, you are saying that there is no need for a  
6 decree to protect citizens' rights and that's the equivalent  
7 of vacator, right?

8       A. In your interpretation, yes, sir.

9       Q. Okay. We can move on.

10           I want to talk a little bit about -- I tell you what.  
11 Let's stick with your report. Let's go to Paragraph 27 of  
12 your report, and we'll talk generally and may get  
13 specifically to that paragraph.

14           You have testified I think on Direct and in response  
15 to Mr. Castelli that lots of police departments or law  
16 enforcement agencies use social media in their  
17 investigations; is that right?

18       A. That is true, yes.

19       Q. And I think the statistic you gave is that 76% of law  
20 enforcement agencies use social media; is that right?

21       A. That is the statistic I put in my report, yes.

22       Q. So this Paragraph 27 that's on the screen, you've got  
23 four examples of -- you've got four examples of things that  
24 might have been discovered by law enforcement on social  
25 media. Is that what these things are meant to indicate?

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1 A. Those bullet points are meant as a demonstrative of my  
2 examples, yes.

3 Q. Okay. So I want to go to the first one, the one in  
4 Ortonville, Michigan, threats on the after-school app. Now  
5 the app, that's not social media, right?

6 A. It is, sir.

7 Q. An app is social media?

8 A. It is, sir, yes.

9 Q. Okay. And threats, can you tell us a little bit more  
10 about the nature of the threats at issue. I see the footnote  
11 there says, teen arrested for using app to threaten  
12 classmates.

13 That would have criminal implications, wouldn't it?

14 A. That language would have criminal implications, yes,  
15 sir.

16 Q. And the Consent Decree expressly allows the Memphis  
17 Police Department to investigate criminal matters, even when  
18 those matters may incidentally implicate First Amendment  
19 rights, right?

20 A. I would say it's not as clear as you've just  
21 articulated it, sir.

22 Q. Well, okay. Well, let's look at the Consent Decree  
23 then and see how clear it is.

24 Let's pull up -- I believe the Consent Decree was  
25 Trial Exhibit 19. Let's go to Section G of the Consent



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1 Decree. Stop there first. I'm going to read that. That's a  
2 little blurry. Mr. Daigle, I'll read the first paragraph of  
3 G for you there. Let me know if I read that correctly.

4 Any police officer conducting or supervising a lawful  
5 investigation of criminal conduct which investigation may  
6 result in the collection of information about the exercise of  
7 First Amendment rights or interfere in any way the exercise  
8 of such First Amendment rights must immediately bring such  
9 investigation to the attention of the Memphis Director of  
10 Police for review and authorization.

11 Did I read that correctly?

12 A. It appears you did, yes, sir.

13 Q. So Section G expressly allows the police to conduct  
14 criminal investigations that may incidentally affect First  
15 Amendment rights?

16 A. With authority from the Director of Police, yes.

17 Q. Right. And that sets out a protocol for obtaining  
18 that authority and what the authority and the review must  
19 contain, right?

20 A. I agree, yes, sir.

21 Q. Okay. Now let's go back to Paragraph 27 of your  
22 report.

23 So with that understanding, the Memphis Police  
24 Department could investigate this matter because it's got  
25 criminal implications even though it may incidentally involve

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1 First Amendment rights; right?

2 A. With the authority of the Director, yes, sir.

3 Q. Okay, great.

4 The same is true for the second example there about a  
5 publishing advertisement that depicted children who  
6 authorities believe to be sex trafficking victims. Sex  
7 trafficking is a crime, right?

8 A. Yes, sir.

9 Q. So Section G would allow the Memphis Police Department  
10 to investigate that, wouldn't it?

11 A. With the authority of the Director, yes, sir.

12 Q. Okay. Let's go to the third one there. Sarasota  
13 County sheriff detectives arrested 25 people during a  
14 four-day initiative focused on protecting Sarasota County  
15 children from online predator and human trafficking.

16 Again, that's a crime Memphis Police Department can  
17 investigate it under the Consent Decree as it's written right  
18 now, right?

19 A. It depends on -- that's not as clear as all of them  
20 were actually criminal applications at the time they started  
21 to look at that four-day initiative. So the answer to your  
22 question is yes, because with the authority of the Director  
23 they could, but when and where they obtained knowledge of  
24 that is part of the investigation aspect.

25 Q. Okay. And then the fourth, the fourth example I think

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1 you called it demonstrative there, that one concerns a gun  
2 fight themed mannequin challenge, seizure of guns, body  
3 armor, marijuana and ammunition. Criminal, right?

4 A. Yes, sir.

5 Q. I want to talk about another -- let's move to  
6 Paragraph 32 of your report, and I have to say I'm confused  
7 by part of that, and I want you to help me clear it up.

8 In 32 and you see kind of in the middle there you pose  
9 a rhetorical question. You say, the average citizen can  
10 search social media for readily available information but a  
11 Memphis police officer may not.

12 I mean, that's not exactly an extraordinary  
13 proposition, right. It's a fundamental concept of  
14 constitutional law that there are things government cannot do  
15 that individuals can, right?

16 A. That's not -- that's not true, sir. That's not true.

17 Q. That's not true?

18 A. No. What we're talking about here is the fact that  
19 the limitations of an officer having the ability to search  
20 social media just as a general everyday officer with -- but  
21 the fact that they're employed by the Memphis Police  
22 Department they can't use open source in their private life  
23 and they can't use open source in their law enforcement life,  
24 that doesn't meet the standard set forth on the use of social  
25 media by citizens in today's world.

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1 Q. Perhaps you didn't understand my question.

2 The First Amendment restrains government generally.

3 It does not generally restrain individuals, correct?

4 A. I don't understand your question, sir.

5 Q. Well, okay. I'll try it again. We'll do it in two  
6 parts.

7 The First Amendment applies to governmental actors,  
8 correct?

9 A. It applies to everybody, but in this case it's  
10 governmental interpretation of First Amendment, yes.

11 Q. Okay. It restrains governmental actors?

12 A. Yes, I agree with that, sir.

13 Q. Okay. It does not generally restrain individuals who  
14 are not governmental actors, correct?

15 A. Yes.

16 Q. So it is not a remarkable thing that the average  
17 citizen might be able to search social media in ways that a  
18 Memphis police officer can't; right?

19 A. I still don't agree, sir, because the aspect of the  
20 collision of the First Amendment and the Fourth Amendment and  
21 the expectation of privacy that applies, the sharing of  
22 information is so volumus that the simple search on open  
23 source by an officer should not be something that implicates  
24 the First Amendment.

25 Q. Well, I tell you what, we can -- there's a language in

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1 your report that might even give us greater clarity. Let's  
2 go to Paragraph 67. I'm going to start reading there near  
3 the bottom. You can see kind of on the right side of that  
4 paragraph, there's a Supreme Court case, Boyd versus United  
5 States.

6 Do you see where I am?

7 A. I do, sir, yes.

8 Q. Okay. I'm going to read there and let me know if I  
9 read this correctly. First that the amendment seeks to  
10 secure the privacies of life against arbitrary power. Did I  
11 read that correctly?

12 A. That's what's said, yes, sir.

13 Q. Okay. And then second and relatedly, that a central  
14 aim of the framers was to place obstacles in the way of a  
15 too-permeating police surveillance. That's language from the  
16 Supreme Court in United States versus Di Re. Is that  
17 correct?

18 A. That's correct, yes, sir.

19 Q. It's at least clear to the Supreme Court that the  
20 First Amendment operates to restrain government and not  
21 individuals, right?

22 A. From conducting surveillance, yes.

23 Q. Okay. I want to talk a little bit about the new  
24 exhibit that was offered for identification today. I think  
25 it's this developing a policy on the use of social media, and

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1 I have that down as Exhibit 29 for ID only. I just have a  
2 few questions. We don't need to go through that policy as  
3 it's not been admitted.

4 I just -- I believe you testified when you were  
5 talking to Ms. Silk that there is little national application  
6 of kind of a single social media policy; is that right?

7 A. As to the investigation of social media, yes, sir.

8 Q. Okay. So that means, you know, each law enforcement  
9 agency is sort of figuring out for itself; right?

10 A. At this point, yes, sir.

11 Q. Okay. Now this particular policy that's Exhibit 29  
12 for ID, that was prepared I believe you testified by the  
13 Bureau of Justice Administration; is that right?

14 A. Yes, sir.

15 Q. That's a federal entity?

16 A. It is -- I don't know whether it's actually a federal  
17 entity or a nonprofit application of the Department of  
18 Justice.

19 Q. Okay. So you're not sure who created this report?

20 A. I am sure of the people who created it. It's the  
21 Bureau of Justice Assistance. I'm just not sure how they're  
22 formed, sir.

23 Q. You're not sure if it's the government or not?

24 A. Yes, sir.

25 Q. Okay. Would you agree with me, though, that different

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1 legal requirements operate against state and federal law  
2 enforcement agencies?

3 A. It's possible, yes, sir.

4 Q. Well, it's necessary, right? For example, the FBI and  
5 FBI agents are not constrained by the Tennessee constitution,  
6 right?

7 A. They are not, no.

8 Q. But police officers in Tennessee are constrained by  
9 the US constitution and the Tennessee constitution, right?

10 A. They are, yes, sir.

11 Q. Okay. So necessarily, different legal obligations  
12 apply to state and federal law enforcement entities?

13 A. Like I said, sir, it is possible, yes.

14 Q. It's necessary, not possible, right?

15 A. Well, it's necessary to the point that the entity must  
16 follow its law in the area that it's governing. So I agree  
17 with you in that aspect, but most of this is federal law  
18 which is a national application.

19 Q. Well, right, but state law enforcement entities are  
20 bound by federal law just like federal law enforcement  
21 entities. State law enforcement entities also are bound by  
22 state law, and federal law enforcement entities are not;  
23 correct?

24 A. I agree with that, yes, sir.

25 Q. Okay. And then the case of Memphis, there are three

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1 layers. Memphis police officers are bound by the Federal  
2 constitution, the Tennessee constitution and also by the  
3 Kendrick Consent Decree; is that right?

4 A. That is true, yes.

5 Q. Neither the Tennessee constitution nor the Kendrick  
6 Consent Decree would apply to, for example, the FBI?

7 A. No, sir.

8 Q. This report, this developing a policy on the use of  
9 social media, does it make any specific mention of law  
10 enforcement entities under consent decrees?

11 A. Under Consent Decree for First Amendment, I do not --  
12 it does not because I do not think -- if there is one or two  
13 others. I think you are one of the elite in this area.

14 Q. Right. Okay. So even if this report makes reference  
15 to law enforcement entities under consent decrees, which you  
16 just testified it doesn't, would have limited application to  
17 Memphis because the Kendrick Consent Decree is unique?

18 A. That is true.

19 Q. Okay. And, in fact, I think you testified when you  
20 were talking to Ms. Silk that most law enforcement agencies  
21 don't have the guidance that the Kendrick Consent Decree  
22 offers Memphis; is that right?

23 A. That is true.

24 Q. Okay. So a generic social media policy or generic  
25 guidelines for creating social media policy would be of



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1 limited use in framing a social media policy for Memphis;  
2 right?

3 A. It would not -- if there is some clearly established  
4 law in the Kendrick Decree would be the guiding principles,  
5 but you do have to pay attention to national application  
6 because we're -- this national application in law enforcement  
7 always has a part in ensuring consistency on interpretation.

8 So while you are correct that the law matters in your  
9 area, there is also a national application which is what this  
10 document appears to attempt to provide some guidance on.

11 Q. Well, now I'm confused because I thought you began  
12 your testimony about this policy by saying there's little  
13 national application?

14 A. There is not any -- there is not any guiding policies  
15 that you can use in this country as an example on this issue  
16 because you guys are the first ones to address under the  
17 Kendrick Decree the issues of using social media  
18 investigation. I believe there's one or two other agencies,  
19 but nobody else has the standards or the requirements placed  
20 on them that you do in the City of Memphis under the Kendrick  
21 Decree.

22 Q. Okay. Couple more questions. I want to pull up the  
23 original Consent Decree again in Trial Exhibit 19. It's Demo  
24 E for us. Let's go to Section H. There, that's good. Let's  
25 stop there.

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1           Now, Mr. Daigle, I thought I heard you testify when  
2           you were speaking to Ms. Silk -- and I may have misheard so I  
3           want you to help me here. I thought I heard you testify that  
4           this section prevents the City from sharing any personal  
5           information. Was that your testimony?

6           A. It could prevent the City from sharing information,  
7           and it probably does. So I'm going to go with yes, it does  
8           prevent because of the inability to identify the requirements  
9           of personal information and how far does that allow Memphis  
10          police officers to go in sharing information.

11          Q. Now see, that's confusing to me, right, because  
12          Section H (1) there says that the City shall not maintain  
13          personal information about any person unless it is collected  
14          in the course of a lawful investigation of criminal conduct  
15          and is relevant to such investigation.

16                 So if personal information is gathered in the course  
17          of a criminal investigation and it's relevant to that  
18          investigation, the City can maintain that and share it;  
19          right?

20          A. That is true, but what we were talking about here is  
21          the collection of information where it's unknown whether or  
22          not a criminal matter is occurring, and that seems to be  
23          coming up in the interpretation portion here, which is a  
24          threat is a threat is a threat. A threat could be like  
25          counsel for the ACLU has said could be a criminal

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1 application, but if you share that, if you share the  
2 information directly related to that threat and it's not yet  
3 a criminal act and/or it doesn't become a criminal act, does  
4 that violate Section H (1) of the application of the Decree.

5 Q. Okay. So I'm not really sure whether that was  
6 responsive to my question. I guess I'll try again.

7 If the personal information is gathered in the course  
8 of a lawful investigation of criminal conduct and it's  
9 relevant to that investigation, Section H does not prohibit  
10 the City from sharing that information, right?

11 A. If it is lawful criminal conduct, yes, it does not  
12 prohibit.

13 **MR. STANTON:** I think that's off all I've got for  
14 you, Mr. Daigle.

15 **THE WITNESS:** Thank you, sir.

16 **THE COURT:** Redirect?

17 **REDIRECT EXAMINATION**

18 **BY MS. SILK:**

19 Q. Mr. Daigle, I'm going to work backwards. I believe  
20 counsel for the monitoring team may have inadvertently  
21 characterized your testimony regarding Section H. If we can  
22 pull back Section H on the Decree, exhibit -- Trial  
23 Exhibit 19, I believe.

24 When you and I were discussing section H, we were  
25 specifically referencing the dissemination of information to

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1 nongovernmental law enforcement agencies, is that correct?

2 A. That is correct, yes.

3 Q. So Section H as it's currently worded prohibits the  
4 City from disseminating personal information collected during  
5 the course of a law enforcement -- a lawful investigation of  
6 criminal conduct to any nongovernmental law enforcement  
7 agencies. That was your testimony; is that right?

8 A. Yes, that was my testimony.

9 Q. Thank you.

10 Now, let's go back to the document that was discussed  
11 that's been marked for identification as Exhibit 29,  
12 developing a policy on the use of social media.

13 A. Yes, ma'am.

14 Q. And I'd like to publish that on the screen, please.

15 **THE COURT:** This is ID only. Go ahead.

16 BY MS. SILK:

17 Q. I just want to direct you to Page 3 of that policy --  
18 excuse me -- of that document. We'll blow it up a little bit  
19 here. The second full paragraph here, could you read that  
20 aloud? This is the second full paragraph beginning with "the  
21 developing a policy"?

22 A. The developing a policy on the use of social media in  
23 intelligence and investigative activities: Guidance and  
24 recommendations is designed to guide law enforcement agency  
25 personnel through the development of a social media policy by

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1 identifying elements that should be considered when drafting  
2 a policy as well as issues to consider when developing a  
3 policy, focusing on privacy, civil rights and civil liberties  
4 protections. This resource can also be used to modify and  
5 enhance existing policies to include social media  
6 information. All law enforcement agencies regardless of size  
7 and jurisdiction can benefit from the guidance identified in  
8 this resource.

9 Q. Thank you.

10 So this document that you're reading from, this was  
11 not created for the FBI or for any particular federal law  
12 enforcement agency; correct?

13 A. No, ma'am. It appears to be a white paper, a research  
14 paper.

15 Q. And in that vain, counsel for the monitoring team made  
16 it clear that not every law enforcement agency is bound by  
17 the same laws. For example the Tennessee FBI is not bound by  
18 the Tennessee constitution. But is it fair to say that all  
19 law enforcement agencies are bound by the US constitution?

20 A. Yes, ma'am.

21 Q. Now to be clear, going back to counsel for the  
22 monitoring team's original question, when you wrote this  
23 report in support of the City's motion to modify or vacate  
24 the Consent Decree, you wrote it with the motion to vacate in  
25 mind; is that right?

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1 A. That is true, yes.

2 Q. And while -- and I believe it was your testimony that  
3 you don't necessarily agree with the City's decision to  
4 withdraw its motion to vacate; is that right? Did I remember  
5 that correctly?

6 A. Yes.

7 Q. But had you written this report with only the City's  
8 motion to modify the Consent Decree, would the report  
9 possibly have taken a different tenor?

10 A. I would have probably not used the word "vacate" in  
11 the course of the report. I think the issues are broken up  
12 individually for the purposes of identifying the concerns in  
13 national standards that apply to each issue. If there was  
14 not a motion to vacate at that time I just would not have  
15 said that as a conclusion in any aspect of the report.

16 Q. Thank you.

17 And one last thing on your report. Counsel for the  
18 monitoring team referenced Paragraph 27 in your report?

19 A. Yes, ma'am.

20 Q. Do you have that in front of you? We can pull it up  
21 on the screen.

22 A. I have it, yes, ma'am.

23 Q. Okay. Counsel for the monitoring team kind of  
24 slow-walked you through several examples of law enforcement's  
25 use of social media. Do you recall that?

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1       A.     I do.

2       Q.     And the implication there is that Section G covered  
3 all of these examples that you list because they're crimes,  
4 but I believe you testified earlier and I'd like for you to  
5 tell us again is social media -- is an investigation on  
6 social media implicates the First Amendment because it is a  
7 platform for speech?

8       A.     No, ma'am.

9       Q.     So let me rephrase that. Is social media a platform  
10 for speech?

11      A.     It is, yes.

12      Q.     Okay. And because it is a platform for speech, any  
13 investigation into it would necessarily implicate the First  
14 Amendment, right?

15      A.     It could, yes.

16      Q.     And so the parties in their Proposed Modified Consent  
17 Decree, Section G -- if we can please pull that up, that is  
18 Trial Exhibit 21 in these modifications -- the parties have  
19 attempted to recognize the fact that social media does  
20 implicate speech but allows for investigation into criminal  
21 conduct that are not directly related to First Amendment  
22 rights to prevent having to get director authorization every  
23 time they look on social media. Do you think that  
24 clarification is important for modern law enforcement agency  
25 like Memphis Police Department?

1       A.    I do think it's important, and the one thing that the  
2   counsel didn't address was the fact while the officers were  
3   investigating this, if they had opened up any of these social  
4   media pages and was faced with other -- well other types of  
5   speech that might implicate the First Amendment it would have  
6   to take their time and get Director's approval and that could  
7   delay some of the significant response that was necessary  
8   there.  So that's the challenge that this issue is faced  
9   with, and that is all of these social media platforms are  
10  intended to be speech.  So the difficulty of separating the  
11  speech from the criminal act is the challenge that the Decree  
12  is dealing with in modification.

13       Q.    Do you believe that the parties' jointly proposed  
14  modifications related to Section D are sufficient to allow  
15  Memphis Police Department to properly protect public safety,  
16  investigate crime while retaining the core tenets of the  
17  Consent Decree?

18       A.    As I said, I think the parties have done a good job of  
19  trying to meet the happy medium while protecting the tenets  
20  of the Decree.  I think it will be more effective for the  
21  officers that are interpreting it.

22               **MS. SILK:**  Thank you.  No further questions.  
23  
24  
25



1           **THE COURT:** I think concludes the witness's  
2 testimony and we appreciate you being here, and we're going  
3 to let you be excused at this time. Thanks so much.

4           **THE WITNESS:** Thank you, Your Honor.

5           **THE COURT:** Now let me go to the City and ask --  
6 I think we know the answer, but will there be any additional  
7 witnesses or offers of proof in connection with this matter?

8           **MS. SILK:** No, Your Honor.

9           **THE COURT:** Okay. The City has rested. Let's go  
10 back -- let's go then to ACLU. This is the opportunity for  
11 the ACLU to present any evidence that you would like to.

12           Mr. Castelli, do you wish to present any evidence  
13 on behalf of the ACLU?

14           **MR. CASTELLI:** No additional evidence, no, Your  
15 Honor.

16           **THE COURT:** Okay. The ACLU having rested, does  
17 the Monitor wish to present any additional evidence in  
18 rebuttal in this matter? Anything, Mr. Stanton?

19           **MR. STANTON:** No, Your Honor, nothing further  
20 from the Monitor.

21           **THE COURT:** All right. That concludes all of the  
22 evidence in this matter, and what we'll do is we understand  
23 that there will be closing statements in a moment by counsel,  
24 and I want to make sure that we know the sequence of them.  
25 Logically in accordance with our order of proof, we might

1 start with the City, but I'm going to ask and see if that's  
2 what you wish to do. Of course the other thing is that there  
3 will be an opportunity for some closing remarks by the  
4 Monitor although it's not necessary. So let me check.

5 Mr. Castelli, any problem with -- I'm going to  
6 ask the City, any problem with you're going first. You may  
7 not want to go first, but it is your burden on this matter.  
8 Any problem with the City going first in connection with  
9 closing statements?

10 **MS. SILK:** We would actually like to hear from  
11 the Monitor since he's neutral first.

12 **THE COURT:** Sure, that's perfectly fine. And  
13 that's what I was checking. And the Monitor I know was  
14 initially probably going to go first. Any -- is that  
15 satisfactory with the Monitor?

16 **MR. STANTON:** Yes, Your Honor. We're happy to  
17 proceed as the Court deems necessary and appropriate.

18 **THE COURT:** That's fine. The Monitor will go  
19 first, then the Movant, the City of Memphis, and then  
20 Mr. Castelli. And then it's a little awkward but normally  
21 the party with the burden would have a chance for rebuttal  
22 argument. What we'll do is then we'll go back to the Monitor  
23 briefly and then we'll go back to the City briefly. It may  
24 not be any need to make any further statement but that's the  
25 order on which we'll proceed. So we'll go Monitor, City,

1 ACLU and then back to the Monitor and then back to the City,  
2 and of course again not necessary to offer rebuttal, but  
3 we'll follow that sequence.

4 Now that we know the order, we've been on air  
5 really or in court session for almost an hour and a half, and  
6 so we would normally take a break at this time. We  
7 understand the timelines on this. Mr. Stanton, we still  
8 anticipate that this will be relatively brief? Is that what  
9 you still anticipate?

10 **MR. STANTON:** That's correct, Your Honor, very  
11 brief.

12 **THE COURT:** About how long, just so I can make a  
13 note?

14 **MR. STANTON:** I would say, Your Honor, certainly  
15 less than ten minutes, five to 10 minutes.

16 **THE COURT:** Okay. That's fine. I'm going to  
17 check briefly with the City, and I'm not sure, Mr. McMullen,  
18 are you handling this?

19 **MS. SILK:** Mr. McMullen said it would be about  
20 15 minutes or less.

21 **THE COURT:** About 15 minutes or less. That's  
22 perfectly fine.

23 Then we're going to go to ACLU. About how long?

24 **MR. CASTELLI:** Five to 10 minutes, Your Honor.

25 **THE COURT:** Five to ten, okay. That's probably

1 what I need to know.

2 Now we will take that break as we would before  
3 any close. We always have a short restroom break. That's  
4 normal. It's at least ten minutes. In this case it will be  
5 12 minutes. Don't mute your mic. If you mute your mic then  
6 we'll have to reinvoke you to the meeting so you'll have a  
7 live mic here. Remember, you have a live mic, and so if you  
8 step away you want to keep that in mind.

9 We'll see everybody at 20 til 11:00 for closing  
10 arguments. Thank you very much.

11 (Brief Recess).

12 **THE COURT:** All right. I think we're about  
13 ready. I just want to make sure we have everyone.

14 We have Mr. Castelli and we have Ms. Silk and  
15 we've got Mr. McMullen and we've got Mr. Stanton. So we have  
16 everyone.

17 This is an opportunity to hear from each entity  
18 including the Monitor in connection with the proposed  
19 modifications and of course the -- particularly that one  
20 issue that relates to Section I, but I think we certainly  
21 need to hear from you on the idea of modification as well,  
22 which there's pretty much a consensus we but we might want to  
23 confirm that, and then of course we want to go into specific  
24 discussion on any sections that we need to be particularly  
25 alerted to in terms of disagreements.

1           So Mr. Stanton, are you ready? You may proceed.

2           **MR. STANTON:** Yes, sir. Thank you, Your Honor,  
3 and certainly to counsel. May it please the Court.

4           In the order finding that City of Memphis was in  
5 contempt of the Consent Decree and providing for the  
6 employment of an independent monitor, it was this Court that  
7 noted the unique opportunity that confronts the City of  
8 Memphis. As the Court explained in its order by saying this,  
9 by successful implementation of the Consent Decree, the  
10 Memphis Police Department has the opportunity to become one  
11 of the few if only metropolitan police departments in the  
12 country with the robust policy for the protection of privacy  
13 in the digital age, end quote.

14           In withdrawing its previous request to vacate the  
15 Consent Decree and instead working with the ACLU of Tennessee  
16 to agree upon 16 of 17 proposed modifications to clarify the  
17 consent decree's meaning, the City appears to have now  
18 embraced its opportunity. My team and I fully support the  
19 parties' compromise. Ultimately we defer to the Court to the  
20 bargain struck by the parties to whatever extent that bargain  
21 is approved by this Court.

22           It should be noted that the Consent Decree as  
23 written does not prevent the Memphis Police Department from  
24 policing. The City's witnesses offered a number of  
25 illustrations including kidnapping, mall shootings and the

1 killing of an undercover operative by the members of a gang,  
2 but all of these examples are crimes, and as this Court has  
3 pointed rather than preventing the police from investigating  
4 crimes, the Consent Decree provides an explicit procedure for  
5 the review and approval of criminal investigations in Section  
6 G. And likewise, as the Court explained two years ago, while  
7 certain terms of the Consent Decree may be outdated, the  
8 concepts -- the concepts are not and the dilemma faced by the  
9 City is not new.

10 After all that has been mentioned even today, the  
11 US and Tennessee constitution's ratified and adopted in 1787  
12 and 1796 are far older than the Consent Decree and police  
13 officers faithfully executed upholding them every day. The  
14 real issue that appears to be less about clarity or age and  
15 more about awareness, training, the Memphis Police Department  
16 integrating the tenets and embracing the tenets of the  
17 Kendrick Consent Decree into the core fabric and culture of  
18 the Memphis Police Department going forward.

19 Now this acknowledgment brings us finally to the  
20 one section of the Consent Decree on which the parties do not  
21 agree. We all know that's Section I. Section I governs the  
22 City's ability to work with and receive information from  
23 other law enforcement agencies and third parties. The ACLU  
24 of Tennessee maintains that Section I may remain as it is.  
25 The City contends that it must be changed but everyone

1 agrees, Your Honor, that Section I as clarified by this  
2 Court's order of November 13, 2019 is clear. And in fact,  
3 since this Court's order providing greater guidance and  
4 context to the Kendrick Consent Decree, not one -- not one of  
5 the 12 requests for authority that my team and I have  
6 received since that order was entered has resulted in a  
7 denial under Section I.

8           And to the extent that the parties agree  
9 codification of the Court's order at Section I, my team and I  
10 support that effort. Now my team and I, we look forward to  
11 transitioning to the auditing and functions phase of our  
12 responsibilities once the Court has ruled in this matter. To  
13 the extent the Court approves the parties proposed  
14 modifications, previously proposed policies and training to  
15 implement the Consent Decree will need to be revised,  
16 reviewed and resubmitted to this Court. The same is true of  
17 the monitor's team audit and compliance plan approved by this  
18 Court earlier this year.

19           In sum, Your Honor, in my role as the independent  
20 monitor, I support the parties' request for modification. I  
21 also support codification of the Court's orders providing  
22 greater guidance. It is the opinion of the Monitor, Your  
23 Honor, that modification and codification would provide  
24 greater clarity, consistency and also, Your Honor, it would  
25 provide for the City to fully adopt, embrace and lawfully

1 implement the core spirit and purpose of the Kendrick Consent  
2 Decree for years to come. Similarly modification with  
3 codification would squarely address the one issue that  
4 remains unresolved between the parties, and that is Section  
5 I.

6 I want to end by quoting something the Court said  
7 that I think is relevant here as we conclude this trial and  
8 this hearing and that is the Court when it ruled in 2018, it  
9 said this, every community must decide how to ensure an  
10 appropriate balance between public safety and protecting  
11 personal rights. That balance is determined not only by the  
12 tenets of the policies but also by the actions taken to  
13 enforce them.

14 Your Honor, thank you for allowing me to be a  
15 part of this vital phase of this process. My team and I  
16 stand ready to act on the Court's orders.

17 **THE COURT:** Thank you very much, Mr. Stanton.  
18 Thank you.

19 And, Mr. McMullen, does the City wish to make a  
20 final argument?

21 **MR. McMULLEN:** Yes, Your Honor.

22 **THE COURT:** Counsel may proceed.

23 **MR. McMULLEN:** Okay. As we're all aware by now,  
24 in 1978 City of Memphis entered into a Consent Decree with  
25 ACLU in federal court. The impetus to that was behavior by



1 the Memphis Police Department that was unacceptable which  
2 violated the constitutional rights of some of its citizens.  
3 After entering into that Consent Decree, since entering into  
4 that Consent Decree, modern technology has exploded in ways  
5 that could not have been imagined in 1978. We go from having  
6 telephones being the major form of communication to social  
7 media. We go to Polaroids -- we go from Polaroids and  
8 cameras where photos have to be developed to a time when the  
9 digital photos that are developed immediately and immediately  
10 stored in the cloud or on some device. We go to our -- one  
11 of our primary forms of communication is not face-to-face  
12 talking, not talking on the telephone, but social media.  
13 Along with that comes unique crimes that involve using social  
14 media and the internet.

15 All of these technological advances were  
16 predicated on the invention of the internet. That has also  
17 led to certain types of crimes that are unique with respect  
18 to the internet, and it is very important for a modern-day  
19 police department to evolve to the point where they could  
20 fight crime where they can fight crime. The challenge for us  
21 was how do we deal with this with a Consent Decree that was  
22 written prior to this form of technology.

23 The City initially filed a motion to vacate the  
24 Consent Decree and/or to modify the Consent Decree. As I  
25 stated in my opening, the City has withdrawn its motion to

1 vacate the Consent Decree but wish to clarify modernize and  
2 codify the Consent Decree so that there's less ambiguity  
3 among the rank and file police department how to execute  
4 within that Consent Decree, and also so that there is more  
5 clarity with the public as to what the police officers are  
6 allowed to do and what they're not allowed to do.

7           The law in this case for modification has  
8 three -- one of three things have to be shown. When the  
9 change of factual conditions make compliance with the Consent  
10 Decree more onerous that is a basis for modification. When a  
11 decree proves to be unworkable because of unforeseen  
12 obstacles, that in and of itself is a basis for modification.  
13 Or when enforcement of the Consent Decree without  
14 modification would be detrimental to public safety, that in  
15 and of itself alone is the basis for modification.

16           And I say to the Court that what we've heard from  
17 the proof that you've heard in this case I think under any  
18 one of those three scenarios we could prove that there is a  
19 basis for modifying the Consent Decree. No one can argue  
20 that the internet itself, the invention of the internet  
21 itself put forth a factual condition that made compliance  
22 with the Consent Decree somewhat onerous. No one can deny  
23 that when a decree proves to be unworkable because of  
24 unforeseen obstacles, the internet itself, the way people  
25 communicate today, the way people network, the advent of the

1 social media as a major form of communication, these things  
2 have impacted how the Consent Decree can be applied, the  
3 types of crimes that can be fought within the parameters of  
4 the Consent Decree.

5           And I do agree with Mr. Stanton, that reading of  
6 the Consent Decree and after getting guidance from the Court,  
7 particularly the Court's order 250 that was filed on November  
8 13, 2019, things became clearer for the ones who worked in  
9 the legal industry interpreting the Consent Decree. If you  
10 look at RFA, request for authorities that the City of Memphis  
11 asked the Monitor for, if you look at all the requests for  
12 authorities after November 13, 2009, there was very little  
13 disagreement about what the Consent Decree meant at that  
14 point and particularly when supplemented with the Court's  
15 guidance. Probably the biggest misunderstanding came prior  
16 to that involving the condition that involved one of the  
17 local professional sports teams, but once the Court issued  
18 its guidance and particularly in document 250, the subsequent  
19 RFA really were a confirmation, a request for -- a  
20 confirmation from the City as applying certain facts as to  
21 what we could do. In very few of those was there any real  
22 disagreement with us and the Monitor.

23           I take great length to go into that because that  
24 supports our need for codification, and as the Court knows  
25 codification is taking language that's explanatory and

1 putting in the document so that a person reading it would not  
2 have to refer back to language that is not in the document,  
3 and I am very mindful that the parties participating,  
4 particularly the lawyers that are participating now, may not  
5 be around to give the total history of the Consent Decree.  
6 The Consent Decree we think should be a document that stands  
7 on its own where someone should be able to read it and  
8 clearly -- it clearly state what it states, and it's clear to  
9 most people whether they have a law degree or not.

10 I do want to address one thing about Section I.  
11 I don't think it's disputed if there's a crime, if Memphis  
12 Police Department receives information about a crime that  
13 there is a procedure that's articulated in the Consent Decree  
14 and the Court's orders in which the Memphis Police Department  
15 can take action to act on that crime. I think that that is  
16 undisputed. What the City of Memphis struggles with were the  
17 gray area threats, threats that do not rise to the level of  
18 being a crime, what you call veiled threats, threats that  
19 schools would call in, that the school enforcement picked up  
20 these threats on social media by certain social media,  
21 threats of saying things like something will be done on this  
22 day.

23 Even if you found the person who made the threat,  
24 you have no criminal charge for saying something like that.  
25 That is too veiled. We struggle with those gray area --

1 those gray area threats. We also struggle with monitoring  
2 the internet in order for preparedness -- to be prepared and  
3 ready when there are protest groups and counterprotest  
4 groups. Part of the job of the police department is to  
5 maintain safety, not to in anyway react one way or the other  
6 to what the group's protesting, but to be content neutral in  
7 providing. Those were the areas in which we struggle with,  
8 and I think with the proof that has come in today, the  
9 explanation from the Court and I think some of the  
10 suggestions that the City of Memphis and ACLU came to with  
11 help -- with the help of a monitor kind of clarified those  
12 things and take away as many of those gray areas as possible.

13 We are -- we understand that every document will  
14 have to be interpreted as fact situations change and the --  
15 no matter how we draft the Consent Decree there will always  
16 be questions. There will be questions. And as long as the  
17 Consent Decree is in place the Court will be there for us to  
18 answer those questions, but for 90% of the things with which  
19 we need to act quickly on we think the modifications we have  
20 put in the Consent Decree along with some definitions,  
21 legitimate law enforcement purposes, that's something that  
22 wasn't really defined in the former Consent Decree.

23 And also with modifying the definition of First  
24 Amendment, changing the phrase from political intelligence  
25 which offered a significant amount of confusion in the

1 community and in the police department, to First Amendment  
2 related intelligence and that definition. We think those  
3 modifications along with the codification of language from  
4 the Court's order would give clarity to the police  
5 department. It will give clarity to the public and it  
6 squarely falls on Item Number 3, one of the items -- one of  
7 the three items that are a basis for modification with  
8 enforcement of the Consent Decree without modification will  
9 be a detriment to the public. We think without the  
10 modifications and the clarifications from the Court it will  
11 detrimentally affect the public; therefore, we ask this Court  
12 to adopt the agreement between the ACLU and the City of  
13 Memphis with respect to the modifications, and we ask the  
14 Court under Section I, which there was a disagreement, we  
15 have submitted some clarifying language that we refer to the  
16 Court and we attach to our supplemental brief. We think this  
17 language adds adequate protection and does not go outside the  
18 character of the current Consent Decree but it adds clarity  
19 so that police officers, police department can know the  
20 boundaries in which they have to stay within and the public  
21 at large will understand and know what the police department  
22 can and cannot do, and we say more than anything that is very  
23 important.

24 Thank you for your time, Your Honor.

25 **THE COURT:** Thank you very much, always,

1 Mr. McMullen.

2 Mr. Castelli, does the ACLU wish to make a  
3 closing statement?

4 **MR. CASTELLI:** A brief closing statement, Your  
5 Honor, thank you. And I'm going to endeavor not to reiterate  
6 some of the things that Mr. McMullen and Mr. Stanton have  
7 both said. I think I'll just kind of hit on the high notes,  
8 and particularly with regard to the proposals that the  
9 parties have jointly made of the Court, I think where the  
10 ACLU agrees with the City is that there is -- there is a  
11 benefit to providing some updated definitions and in  
12 providing some materials from the Court's recent orders on  
13 the Decree, into the Decree to provide clarity. And from the  
14 ACLU's perspective, our reason for that is probably little  
15 different from the City. Our reason for that is so that it  
16 is clear and there cannot be misunderstandings and the  
17 training will be facilitated so that if there are future  
18 violations to the Decree it is not because of a  
19 misunderstanding or lack of training but clear because those  
20 are violations made that are known and we can address that.  
21 So, you know, perhaps we won't have any further violations if  
22 we do that.

23 I believe the Court's order in this case found  
24 that a lot of the problems and the contempt of the Decree  
25 came from a lack of information and a lack of training and a

1 lack of understanding on the part of the officers, not from  
2 the any ill intent, and that's what we're hoping to avoid in  
3 the future. I think that the proposals that we made are all  
4 in that vain, and I think what's important to us is that none  
5 of the protections that the Decree has offered for 40 years  
6 should be lessened, that the Decree still prohibits the City  
7 from using social media or the internet to draw associations  
8 between people, any attempt to create an escort list as was  
9 done and found to be a violation of the Decree, using  
10 undercover accounts for the purpose of infiltrating groups  
11 that are free -- that are conducting protected First  
12 Amendment activity which was one of the issues found by the  
13 Court in this original action to violate the Decree.

14 All of that remains intact, and what we're adding  
15 would clarify that that type of conduct is prohibited by the  
16 Decree and also adds in this case -- some of the proposals  
17 would add responsibilities to the City to create controls for  
18 those undercover accounts so they know what officers are  
19 utilizing those tools and when they're utilizing them in a  
20 way that might violate this Decree or First Amendment rights  
21 in general. I think that's a good thing.

22 Section I is where we disagree, and I will say  
23 our position is not that we think that Section I might not  
24 benefit from additional language from this Court's  
25 November 2019 order. We disagree with the proposed language



1 particularly, and this will I'm sure be much -- filled out in  
2 much greater detail by the briefs of the parties, but  
3 particularly the City has proposed striking language from the  
4 original decree of "cooperate with" which the ACLU disagrees  
5 with and thinks that that's an essential concept that the  
6 City and the Memphis Police Department need to understand  
7 about what Section I should be restricting with regard to  
8 joint operations, that they can't ask another party or direct  
9 another party to do what they cannot do under the Decree.

10           They also can't cooperate with someone they know  
11 are taking steps that would violate the Decree, and we think  
12 that that is essential to the integrity of the entire Decree.  
13 In addition to the language that the City has proposed  
14 generally we think goes a little bit beyond what the Court  
15 said in its order so that's why we have proposed the proposed  
16 language -- the language that has been proposed by the City.

17           In particular, the last sentence saying, nothing  
18 in this section precludes the city from receiving tips from  
19 nonlaw enforcement agency or individuals lacks some context  
20 of what this Court ruled and what Section I was meant to do.  
21 It almost creates an exception that might the rule, and so  
22 our primary objection to the proposed modification by the  
23 City of Section I is that we believe it really goes beyond  
24 what this Court -- how this Court interpreted Section I and  
25 the guidance this Court offered on Section I, and we would

1 want any type of modification or -- first of all, we would  
2 ask that the original language remain intact as we have tried  
3 to do in a lot of the proposed modifications that we've  
4 offered to the Court that we could agree to, but then also  
5 any explanatory or additional words -- I think the term has  
6 been used codifying of the orders of the Court into the  
7 Decree to reflect precisely what the Court ruled in the  
8 November 2019 order. So that position as I said will be  
9 developed in more detail in the briefing that comes, but I  
10 guess in conclusion, though, the ACLU's position overall in  
11 this is that we believe that the City has come to the table  
12 with the intent of not trying to remove itself from the  
13 requirements of the Decree but instead in an attempt to make  
14 the Decree something more workable for its police officers.

15 I will say, though, that nothing that the parties  
16 agreed to, nothing -- no modifications that are made will  
17 replace the importance I believe going forward of good  
18 training on this Decree like pretty much anything else. Law  
19 enforcement as the evidence has shown during this case -- law  
20 enforcement officers have to know and interpret a lot of law.  
21 They have to deal with the entire constitution, the state --  
22 US constitution and state constitution, all the statutes, and  
23 that's going to involve some degree on the officer's  
24 individual level of interpreting that law, deciding how it  
25 applies to the situation in front of them; and that is going

1 to be no different with this Decree modified or no.

2 So training going forward is going to be very  
3 important if not essential to ensuring compliance. So  
4 hopefully some of these proposed modifications will enable  
5 that training and enable the City to stay in compliance with  
6 the Decree moving forward.

7 Thank you, Your Honor, for the opportunity to  
8 present ACLU's argument today and we look forward to the  
9 briefing.

10 **THE COURT:** Thank you, Mr. Castelli.

11 I said we would then come back to the Monitor for  
12 any further comments if you wish to make them and then of  
13 course go to the City.

14 Anything else from the Monitor?

15 **MR. STANTON:** Nothing further, Your Honor.

16 **THE COURT:** All right. And thank you,  
17 Mr. Stanton.

18 Mr. McMullen, anything else from the City?

19 **MR. McMULLEN:** Nothing, Your Honor. Thank you.

20 **THE COURT:** Well, that will conclude the hearing,  
21 and I was trying to get a readout on when the transcripts  
22 would be available. I'm not sure I've gotten that yet. What  
23 we're going to do is we will -- I'm checking here. We will  
24 have the time periods run from the date of the delivery of  
25 the last transcript. We'll also check with the reporters so

1 that that can be delivered as promptly as possible,  
2 understanding that the parties are ordering that transcript  
3 which of course is appropriate.

4           These are important matters, and it is fair to  
5 say that in so many ways the City, the Monitor and the ACLU  
6 have been a model of how to handle matters in a constructive  
7 way. That is much appreciated by the Court, and I don't  
8 often get a chance to say that, but it's certainly worth  
9 saying in this case.

10           These are important issues. They're important  
11 issues throughout the United States, but these of course are  
12 the issues that apply to the City of Memphis, and everyone  
13 would concede that working as a cooperative group it has been  
14 the right legal approach and is much, much appreciated.

15           Now we will look forward to getting the briefs.  
16 We know we still have some unresolved issues, and as soon as  
17 we get all the briefing in, we will proceed to prepare and  
18 enter an order in the matter. Again, to all the attorneys  
19 involved, I really do appreciate the hard work that is  
20 evident in the quality presentations that you have all made.  
21 Thank you all very much.

22           Mr. Sample, you may place the Court in  
23 adjournment for today. Thank you.

24           (Adjournment.)  
25

**C E R T I F I C A T E**

I, LISA J. MAYO, do hereby certify that the foregoing 77 pages are, to the best of my knowledge, skill and abilities, a true and accurate transcript from my stenotype notes of the TRIAL on 22nd day of June, 2020, in the matter of:

ACLU of Tennessee, Inc.

vs.

City of Memphis, Tennessee

Dated this 06.25.2020.

S/Lisa J. Mayo

LISA J. MAYO, LCR, RDR, CRR  
Official Court Reporter  
United States District Court  
Western District of Tennessee